Supreme Court, U.S.
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91-1248

DOCKET NO: _____

UNITED STATES SUPREME COURT

OCTOBER, 1991

ALANA SUDWISHER

VERSUS

ESTATE OF PAUL C. HOFFPAUIR, ET AL.

ON REHEARING BY THE LOUISIANA STATE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

JOHN F. CRATON
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QUESTIONS PRESENTED FOR REVIEW

Was the Louisiana Supreme Court correct in compelling Rosemary Hoffpauir Schuh, the natural daughter of Paul C. Hoffpauir, and a nonparty to the suit, to submit to DNA blood testing in an attempt to prove filiation between Paul C. Hoffpauir and the Plaintiff, Alana Sudwisher?

Was the Louisiana Supreme Court correct in ascribing a constitutional right to prove filiation to the Plaintiff, Alana Sudwisher?

If Alana Sudwisher does have a constitutional right to prove filiation, does that right outweigh Rosemary Hoffpauir Schuh's constitutional right to privacy and the right to be protected from unreasonable search and seizure?

Is compelling a person to submit to a blood test a reasonable search and seizure when the blood test is performed under circumstances that afford an unknown degree of accuracy and the test will not be directly dispositive of the issue before the court?

If the plaintiff is not required or fails to make a prima facie showing that the compelling of blood tests is reasonable and justified under the circumstances has Rosemary Hoffpauir Schuh been denied due process and/or equal protection under the laws in violation of the fourteenth amendment to the United States Constitution?

LIST OF ALL PARTIES

PLAINTIFF:

ALANA SUDWISHER

DEFENDANT:

ESTATE OF PAUL C. HOFFPAUIR;

PAUL C. HOFFPAUIR, JR., CO-TESTAMENTARY EXECUTOR OF THE ESTATE OF PAUL C. HOFFPAUIR

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TABLE OF AUTHORITIES

I. CONSTITUTIONAL PROVISIONS

1. U.S. Constitution Amendment IV-SEARCH AND SEIZURE

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. U.S. Constitution Amendment XIV-§1 CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION;

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II. STATUTES

1. LSA R.S. 9:396(A)

Notwithstanding any other provisions of law to the contrary, in any civil action in which paternity is a relevant fact, or in an action en desaveu, the court, upon its own initiative or upon request made by or on behalf of any person whose blood is involved, may or, upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order

the mother, child and alleged father to submit to the drawing of blood samples and shall direct that inherited characteristics in the samples, including but not limited to blood and tissue type, be determined by appropriate testing procedures. If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others in the interest of justice so require.

III. CASES

1. Breithaupt v. Abram, 352 U.S. 432, 77 S. Ct. 408, 1 L.Ed. 2d 448 (1957)

2. Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 156, 56 L.Ed. 2d 185, 98 S. Ct. 1729 (1978).

3. In the Interest of the Minor Child, J. M., _____ So.2d _____ (La. 1991) Docket No. 91-CA-1772.

4. Marshal v. Barlows, 436 U.S. 307 (1978).

5. National Treasury Employees Union v. Vaughn Raab, 489 U.S. 656 (1986);

6. Schmerber v. California, 384 U.S.757, 86 S. Ct. 1826, 16 L.Ed. 2d 908 (1966).

7. Trimble v. Gordon, 430 U.S. 762, 97 S. Ct. 1459, 52 L.Ed. 2d 31 (1977)

REFERENCE TO OFFICIAL AND UNOFFICIAL

REPORTS OF OPINIONS

1. Sudwisher v. Estate of Hoffpauir, Third Circuit, writ denial, unreported.

2. Sudwisher v. Estate of Hoffpauir, 577 So.2d, 1 (La. 1991).

3. Sudwisher v. Estate of Hoffpauir, 580 So.2d, 366 (La. 1991).

4. Sudwisher v. Estate of Hoffpauir, ___ So.2d _____ (La. 1991), Docket No: 91-CC-0515.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The date of the entry of judgment sought to be reviewed in this matter is October 31, 1991.

The jurisdiction of this Honorable Court is based on 28 USC § 1257(a):

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had,may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is Drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

CONSTITUTIONAL PROVISIONS

1. **U.S. Constitution Amendment IV-SEARCH AND SEIZURE**

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. **U.S. Constitution Amendment XIV-§1 CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION;**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the

State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This could be referred to as a paternity case with a different twist. The plaintiff, Sudwisher, has brought a petition in the Fifteenth Judicial District Court for the Parish of Acadia, State of Louisiana to be recognized as heir of Paul C. Hoffpauir, Sr. The suit names as defendants the Estate of Paul C. Hoffpauir, et al. Although they are not specifically designated as defendants, Paul C. Hoffpauir, Jr. and Mrs. Paul C. Hoffpauir, Sr. are described in the petition as being the co-testamentary executors of the succession. Mrs. Paul C. Hoffpauir, Sr. has died since the filing of the lawsuit. At the time the suit was filed plaintiff's mother was dead, the alleged father, Paul C. Hoffpauir, Sr. was dead and the plaintiff's mother's husband, Davis Benoit, (plaintiff's father as shown on her birth

certificate) was dead. Plaintiff has filed a Motion To Compel seeking to have Rosemary Hoffpauir Schuh, the daughter of Paul C. Hoffpauir, Sr., submit to DNA blood tests for the purpose of attempting to determine if there is any relationship between Plaintiff and Rosemary Hoffpauir Schuh.

Paul C. Hoffpauir, Sr. died August 30, 1979. This suit was filed after his death on March 26, 1981 by Alana Sudwisher seeking to be named as the natural daughter of Paul C. Hoffpauir, Sr. and claiming a portion of his estate. Her mother, Joyce Benoit, and Davis Benoit, her father, as shown on her birth certificate, were both deceased at the time she filed her suit. Her mother had been dead for over 10 years before Paul Hoffpauir died. Her mother never told her that Paul Hoffpauir was her father, according to her own deposition testimony. The plaintiff is attempting to

get the court to order Rosemary Hoffpauir Schuh, the legitimate daughter of Paul C. Hoffpauir, Sr., to submit to a blood test for the purpose of DNA parentage testing.

According to the Plaintiff, Paul Hoffpauir, a resident of Crowley, called her to a motel room in Rayne in 1969. It was in that motel room, with no one else present, that Paul Hoffpauir allegedly told her that he was her father. She was nineteen years old at the time. Her mother had been dead for about three years. She cannot recall her mother ever telling her that Paul Hoffpauir was her father. Paul Hoffpauir suffered a stroke in 1972 and was bedridden and incapacitated until his death in 1979. Some eighteen months after his death this suit was filed and was a complete surprise and shock to his family and friends. Unfortunately Paul C. Hoffpauir, Sr. was not alive to defend

himself when suit was filed. The State District Court denied Plaintiff's request for blood tests since it did not meet the requirements of LSA R.S. 9:396. (Appendix page iv). The Louisiana Third Circuit Court of Appeals denied the plaintiff's writ application stating the district court's decision was correct. (Appendix page v).

The Louisiana Supreme Court, without a hearing, reversed and ordered the blood tests be taken when they first received plaintiff's writ application. (Appendix page vii). A rehearing was requested and granted. (Appendix page xii). This rehearing yielded a four-three decision that the blood tests be taken. (Appendix page xiii) This writ is requested to review that decision.

STAGE OF PROCEEDINGS IN WHICH CONSTITUTIONAL QUESTIONS WERE RAISED

1) Constitutional issues were raised in briefs and oral arguments at the State District Court level. The decision of the District Court did not focus on the constitutional issues, but was decided on the narrower grounds interpreting LSA R.S. 9:396.

2) In the proceeding before the Louisiana State Supreme Court the constitutional issues of right to privacy, right to be free from unreasonable search and seizure, and right to due process, were briefed, orally argued and considered in deciding the case.

ARGUMENT

"This case concerns the constitutional balance between plaintiff's interest in proving filiation and an heir's right to refuse a blood sample."

This the opening line of the Louisiana Supreme Court's decision to order the taking of blood tests in this case. Justice Watson's opinion goes on to analyze what he perceives to be the balancing of these two competing constitutional rights.

The statement is made that Sudwisher "has a constitutional right to prove filiation to a deceased father." This right is "weighed against the invasion of Rosemary's privacy presented by a compelled blood test." This "weighing" is handled in one paragraph simply by saying:

> "Although she bears the Benoit name, Alana has never enjoyed a father/daughter relationship with Benoit.

> She has an overriding emotional and financial interest in knowing her father's identity. Rosemary has a financial interest in opposing Alana's claim but has asserted no physical or religious obstacles to a blood test. Schmerber v. California, 384 U.S.757, 86 S. Ct. 1826, 16 L.Ed. 2d 908 (1966). The invasion of Rosemary's privacy is minimal. Breithaupt v. Abram, 352 U.S. 432, 77 S. Ct. 408, 1 L.Ed. 2d 448 (1957). Rosemary has the alternative of conceding a relationship to Alana. Under these circumstances, the trial court erred in denying Alana's motion to compel the DNA testing of Rosemary's blood."

There is a separate opinion by Justice Lemmon, which is labeled a concurring opinion, but which goes on to discuss the State's interest in ordering the tests, but adds that there should be a requirement that the mover make a prima facie showing of filiation in order to obtain the

requested order.

The dissenting opinion by Justice Dennis, concurred in by Chief Justice Calegaro and Justice Cole recognizes that the case involves constitutional balancing but states that the majority does not focus on the constitutional rights genuinely at issue. The dissent takes the position that Trimble v. Gordon, 430 U.S. 762, 97 S. Ct. 1459, 52 L.Ed. 2d 31 (1977) does not go as far as the majority opinion states, in that Trimble does not recognize a constitutional right to inherit property or to filiate per se. The plaintiff in Trimble had standing to bring a constitutional claim because she was able to show an affirmative state action which impermissibly infringed upon her right to be treated equally under the law.

The dissent correctly concludes that:

" . . . Sudwisher has

> failed to allege the existence of a statute which impermissibly infringes on her right to pursue her claim of legitimacy. There has been no affirmative act on the part of the state to interfere with her right to equal protection of the law. Absent state action, then, Sudwisher has no constitutional right which can be raised in this matter to balance against the rights of Schuh. Schuh, however, can show state action. An affirmative order of a district court forcing her to submit to a blood test would meet even the most conservative notions of state action espoused by the U. S. Supreme Court in Flagg Bros." (referring to Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 156, 56 L.Ed. 2d 185, 98 S. Ct. 1729 (1978).

The constitutional rights afforded to illegitimates in the Trimble case guaranteeing equal protection under the law have been satisfied by Louisiana law. Louisiana has enacted statutes to satisfy

those constitutional rights and to provide a procedure for illegitimates to prove filiation. One of those statues is LSA R.S. 9:396 which sets out how blood tests are to be conducted in paternity cases. Sudwisher's complaint in this case is that she doesn't like the way a state court has interpreted this statute. She has not claimed to have been denied equal protection because she is an illegitimate. She has not claimed a denial of due process.

On the other hand, everyone agrees that Rosemary Hoffpauir Schuh has a constitutionally protected right to privacy and a protection against unreasonable searches and seizures.

In Schmerber v. California, supra, this court determined that court ordered blood testing involves a search and seizure under the Fourth Amendment of the United

States Constitution. The Fourth Amendment acts "to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." Schmerber, supra, at page 767. Schmerber was a criminal case involving a defendant who was arrested for driving under the influence of alcohol. It was held that the test was reasonable because the state had an interest in securing evidence of drunk driving, the test was of a routine nature, there was minimal intrusion and there was a virtual absence of risk or pain involved with the blood test, the blood test was effective in determining whether the person was drunk, and the test was properly administered by medical personnel within a hospital setting. This court has held that the Fourth Amendment prohibition against

unreasonable search and seizure applies to civil cases as well. National Treasury Employees Union v. Vaughn Raab, 489 U.S. 656 (1986); Marshall v. Barlows, 436 U.S. 307 (1978).

Using this analysis the question becomes whether or not the intrusion is justified in the circumstances or is made in an improper manner.

This is where the new twist enters the picture. No one seems to be giving full consideration to the question of what result will be had if the intrusion is allowed and the blood test is taken. Although the Louisiana Supreme Court had the benefit of reading Dr. Craig Cohen's deposition which was in the record, the statements of its contents included in the majority opinion do not convey the full message. Dr. Cohen is the DNA expert contacted by the plaintiff to perform these

proposed tests.

Dr. Cohen is very forthright in clearly stating that he will not be able to express any opinion on whether or not Paul C. Hoffpauir is Sudwisher's father. He will only be able to express an opinion that Sudwisher and Rosemary Schuh do share common genes or that they don't share any common genes. If they do share common genes he can give us (by referring to statistics dealing with the percentage of the population that share the various genes) the probability that they share those genes by chance and conversely the probability that they are related in some fashion. There will be no way to tell the type or degree of relationship. If there is any probability that they are related, it will not be possible to say whether or not the relationship is one in which they share the same father, or are cousins, or

even that they acquired those common genes through the same person.

To further compound this problem, Dr. Cohen cannot even guarantee us what the accuracy of his results will be. Under normal testing conditions (testing the mother, the alleged father and the child) he can guarantee the accuracy of his findings to a degree of above ninety-nine (99%) percent. He clearly states that because this is not the normal type of testing that is done in paternity cases he cannot guarantee the accuracy of his results. When asked what the degree of accuracy would be in this case, he responded: "In [this] case, I don't know what it would be. I cannot guarantee 99% level." (Cohen deposition page 28 lines 18 through 20).

This is important because any weighing or balancing procedure should take into

account the result you hope to accomplish. In this case it is difficult to say exactly what will be accomplished. Even the expert chosen by the plaintiff cannot say for certain. This introduces a danger of using what is generally perceived to be a highly reliable test (DNA test) in an unusual and perhaps experimental context.

The Uniform Blood Test Act, of which LSA R.S. 9:396 is a part, was enacted and followed because the constitutional rights of the father to an unreasonable search and seizure was outweighed by the compelling state interest in determining who the child's (usually a minor) father was for the purpose of obtaining child support. Keep in mind, however, that the act provides for a scientific test that will produce a conclusion that has a known and proven degree of accuracy when used under specific circumstances. In other words,

when you require the alleged father to submit to a blood test, (or you require the suspected drunk to submit to a blood test) you outweigh their constitutional rights in favor of finding a result that has a known degree of accuracy and a conclusion that is directly dispositive of the issue before the court. You cannot say that this court meets that criteria when you require Rosemary Hoffpauir Schuh to submit to a blood test under these circumstances. This certainly should be taken into account before she is deprived of her constitutional rights.

Under Schmerber, supra, the intrusion was reasonable because the test was known to be effective in determining whether a person was drunk. The Uniform Blood Tests Statutes are determined to be a reasonable intrusion because the results are known to be effective in determining the probability

of paternity. Blood tests used in the context of this case will not be known to be effective and they will not be determinative of paternity.

Another argument weighing against the ordering of blood tests in this case is that the plaintiff has not made a prima facie showing that the test is warranted. Justice Lemmon in his concurring opinion raises this as a requirement. Additionally, the Louisiana Supreme Court, in In the Interest of the Minor Child, J. M., _____ So.2d _____ (La. 1991), Docket No. 91-CA-1772, decided on December 2, 1991 said that a prima facie showing must be made by a party requesting a blood test under LSA R.S. 9:396. The issue was raised at the district court level and the supreme court level in the present case, but was only brought out in the concurring opinion. This question raises the issue of whether

or not a person's right to due process has been denied if there is no formal showing of a prima facie case before the tests are ordered. In the present case, there has been no specific finding of, or even an attempt to prove, a prima facie case. The Louisiana Supreme Court now agrees that such a showing must be made. The same ruling should be applied in this case before the tests can be ordered taken. This should be true whether the blood tests are ordered under the authority of LSA R.S. 9:396 or under the authority of Louisiana's general discovery articles.

If the distinction is then raised that the prima facie case is required when the blood tests are ordered under LSA R.S. 9:396 and not when the blood tests are ordered under the Louisiana general discovery statutes, then I submit that Rosemary Hoffpauir Schuh has been denied

equal protection of the laws.

CONCLUSION

This case presents several constitutional questions as set out on page 1 of this petition. There is the question of whether or not the plaintiff has raised any constitutional rights to be balanced against those of Rosemary Hoffpauir Schuh. If in fact plaintiff has any to raise, is it correct to say that her rights outweigh those of Rosemary Hoffpauir Schuh's. Undoubtedly Rosemary Hoffpauir Schuh's rights will be violated if she is ordered to take the blood tests. By submitting to the violation and intrusion, little, if anything, will be accomplished. Even Justice Lemmon, the author of the concurring opinion that provided the bare majority in the State Supreme Court, questions whether or not the results will be admissible. The doctor who will perform

the test cannot guarantee the accuracy of whatever his findings will be and the results will not allow him to express an opinion on the issue before the court. Rosemary Hoffpauir Schuh's rights should not be taken so lightly as to require them to be waived when nothing can be accomplished as a result of those waivers.

On the other hand, if the court should find that the tests should not be conducted, Plaintiff has not been denied anything. She will not be denied any rights to prove filiation because she still has an opportunity to prove filiation through other means. Plaintiff has no constitutional right to a blood test. She had an opportunity to have a blood test taken before the death of Paul C. Hoffpauir, Sr. It was her choice to file suit after his death. Plaintiff's only real complaint is that she does not like

the way that a state district court has interpreted a state statute. Plaintiff has no constitutional rights that can be raised to compete with those of Rosemary Hoffpauir Schuh in this case. Her Motion To Compel should be denied. The decision of the Louisiana State Supreme Court should be reversed.

APPENDIX

1. Ruling of the 15th Judicial District Court, dated December 2, 1990 by the Hon. G. Bradford Ware.....P i

2. Judgment on Motion, 15th Judicial District Court, dated January 9, 1991 signed by the Hon. G. Bradford Ware.....P iv

3. Denial of Writ Application, Court of Appeals, Third Circuit, State of Louisiana, dated January 23, 1991, initialed by Hon. J.M.S., P.J.L., Jr., and J.T.K.....P v

4. Reversal of the Writ Application, Supreme Court of the State of Louisiana, dated April 11, 1991, initialed by Hon. JCW, WFM, HTL, and PH.....P vii

5. Order Granting the Rehearing, Supreme Court of the State of Louisiana, dated May 17, 1991,

initialed by Hon. HTL, PFC, JLD,
LFC, and PH.....P xii
6. Ruling of the Rehearing,
Supreme Court of Louisiana, dated
October 31, 1991, by Justice Watson,
Justice Lemmon, Justice J. Dennis,
and Justice J. Cole.....P xiii

FIFTEENTH JUDICIAL DISTRICT COURT

PARISH OF ACADIA

STATE OF LOUISIANA

ALANA SUDWISHER :

VS. :

DOCKET NO. 47,796-A

ESTATE OF PAUL C. HOFFPAUIR, ET AL :

R U L I N G

This matter is before the Court on a motion to compel the taking of blood tests filed on behalf of the plaintiff, Alana Sudwisher.

This suit was filed on March 26, 1981, by Alana Sudwisher seeking to be named as the natural daughter of Paul C. Hoffpauir, Sr., who died on August 20, 1979. The plaintiff is attempting to get the Court to order Rosemary Hoffpauir Shuh, the legitimate daughter of Paul C.

Hoffpauir, Sr., to submit to a blood test for the reasons stated above.

Louisiana law, LSA-R.S. 9:396, explicitly provides that an father, a mother, and a child shall be ordered to submit to the drawing of blood for the purpose of determining parentage. (Emphasis added). Comparing this statute to the relevant facts at hand, both the alleged father and mother are deceased, leaving only one of the statutory individuals available for testing. This statute is very limited in scope and does not provide for the compulsory testing of anyone other than the mother, the child and the father. Mrs. Sudwisher does not fall into any of the above categories.

Therefore, this motion to compel is hereby denied.

Costs of these proceedings are to be borne by the plaintiff, Alana

Sudwisher.

A Judgment conforming to this Ruling will be signed upon presentation.

THUS DONE AND SIGNED in Chambers at Crowley, Acadia Parish, Louisiana, this 2nd day of December, 1990.

G. BRADFORD WARE, District Judge

Copy to:

Mr. Stephen Stefanski

Mr. John F. Craton

ALANA SUDWISHER : 15TH JUDICIAL DISTRICT COURT

VS. NO. 47796 PARISH OF ACADIA

ESTATE OF PAUL C. HOFFPAUIR STATE OF LOUISIANA

****

JUDGMENT ON MOTION

Pursuant to reasons rendered by this Honorable Court after considering the Motion to Compel the taking of blood tests filed by plaintiff, ALANA SUDWISHER:

IT IS ORDERED, ADJUDGED AND DECREED that the Motion to Compel the taking of blood tests is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff, ALANA SUDWISHER, pay all costs in connection with the Motion to Compel.

JUDGMENT SIGNED this 9th day of January, 1991, in Crowley, Acadia Parish, Louisiana.

G. BRADFORD WARE, DISTRICT JUDGE

No. W91-68

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

Filed: January 23, 1991

Uaucy U. Pledger, Clerk

ALANA SUDWISHER

VERSUS

ESTATE OF PAUL C. HOFFPAUIR, ET AL.

In Re ALANA SUDWISHER

Applying for Certiorari, or writ of review, to the 15th Judicial District Court, Parish of Acadia, State of Louisiana.

EDWARDS, STEFANSKI (STEPHEN A. STEFANSKI), CROWLEY, LA 70526. ATTORNEY FOR APPLICANT.

JOHN F. CRATON, CROWLEY, LA 70526. ATTORNEY FOR RESPONDENTS.

February 14, 1991

Lake Charles, Louisiana

WRIT DENIED: The judgment of the trial court denying the motion to compel blood tests is correct.

J.M.S. P.J.L., Jr. J.T.K.

THE SUPREME COURT OF THE
STATE OF LOUISIANA

ALANA SUDWISHER

VS. NO. 91-CC-0515

ESTATE OF PAUL C. HOFFPAUIR, et al

- - - - -

April 11, 1991

Granted. See order. (Per Curiam)

JCW

WFM

HTL

PH

CALOGERO, C.J., would grant for docketing.

DENNIS, J., would grant for full review and a complete opinion. This case raises several important questions that should be considered and resolved by this Court including whether the statute authorizes a compulsory blood test in this situation, whether a threshold showing for the test must be made, and whether the trial judge abused his discretion.

COLE, J., respectfully dissents from the order. The majority's action equates to judicial legislation, ignoring the admonition of Article 1 of our Civil Code. La. R.S. 9:396 is explicit and controls.

Supreme Court of Louisiana
April 11, 1991

John Tarlton Oliver
Deputy Clerk of Court

==========

SUPREME COURT OF LOUISIANA

No. 91 CC 0515

ALANA SUDWISHER

versus

ESTATE OF PAUL C. HOFFPAUIR, ET AL

==========

PER CURIAM:

The trial court, relying on a strict interpretation of LSA-R.S. 9:396A, denied the motion of Alana Sudwisher to require Rosemary Hoffpauir Shuh, the legitimate daughter to Paul C. Hoffpauir, Sr., to submit to a blood test. Only Sudwisher, who claims to be the natural daughter of the deceased Hoffpauir, and Shuh, now survive their respective mothers and Hoffpauir.

While it is true that the statue names only the father, the mother and the

child as subject to being ordered to have blood drawn for the purpose of determining paternity, it clearly recognizes the strong evidentiary force of blood tests in a suit involving parentage and does not prohibit testing others.

The pertinent discovery article is LSA-C.C.P. art. 1422, which provides in part that: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action..." When the blood test statute and the discovery article are considered together, they constitute authority for granting Sudwisher's motion.

Therefore, the trial court erred in denying the motion. The judgment of the trial court is reversed; the motion is granted.

MOTION GRANTED; CASE REMANDED FOR FURTHER

PROCEEDINGS.

THE SUPREME COURT OF THE

THE STATE OF LOUISIANA

ALANA SUDWISHER

VS. NO. 91-CC-0515

ESTATE OF PAUL HOFFPAUIR ET AL

- - - - -

In Re: Estate of Paul C. Hoffpauir et al applying for Rehearing from the Fifteenth Judicial District Court, Parish of Acadia No. 47,796, Third Circuit Court of Appeal No. CW91-0068

- - - - -

May 17, 1991

Rehearing granted for briefing and argument.

HTL

PFC

JLD

LFC

PH

Supreme Court of Louisiana
May 17, 1991

Frans J. Labranche, Jr.
Clerk of Court
For the Court

Filed: October 31, 1991

SUPREME COURT OF LOUISIANA
NO. 91 CC 0515
ALANA SUDWISCHER
versus
ESTATE OF PAUL HOFFPAUIR, ET AL

ON REHEARING

WATSON, Justice.

This case concerns the constitutional balance between plaintiff's interest in proving filiation and an heir's right to refuse a blood sample.

Plaintiff, Alana Benoit Sudwischer, sued to establish filiation to Paul C. Hoffpauir, alleged to be her deceased natural father. LSA-C.C. art 209(B).[1] Hoffpauir died intestate, survived by his

[1] Article 209(B) provides "A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or by acknowledgment under Article 203 must prove filiation as to an alleged deceased parent by clear and convincing evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this Article."

widow; an adopted son, Paul C. Hoffpauir, Jr.; and a legitimate daughter, Rosemary Hoffpauir Schuh. Alana seeks a compelled blood test of Rosemary to aid in proving her filiation. The trial court denied the motion to compel because LSA-R.S. 9:396 does not authorize blood test of siblings. The court of appeal, third circuit, denied a writ, stating that the judgment of the trial court was correct. This court ordered Rosemary's blood tested but granted a rehearing for further consideration of the issues.

LSA-R.S. 9:396 postulates the existence of an alleged living father and does not statutorily authorize the testing sought in this case. In context, the statute is directed at establishing paternity for purposes of child support. There is no indication that the statutory language expresses a deliberate policy of

limitation.

At the time of Alana's birth, her mother was married to Davis Benoit, but Benoit never lived with them in a family unit. Benoit was in prison, both when Alana was born (1951) and during the preceding year (1950). Although Benoit's name is on Alana's birth certificate, they have never had any association. Alana's legal status as Benoit's child does not preclude her from proving filiation to Hoffpauir. Griffin v. Succession of Branch, 479 So.2d 324 (La. 1985).

Alana's statutory burden of proof is "clear and convincing evidence." This standard of proof is more stringent than the preponderance standard which generally applies in civil cases. See Fykes v. Clark, 635 S.W.2d 316 (Ky. 1982) and Chester for Chester v. Secretary of Health, 808 F.2d 473 (6th Cir. 1987) (applying a

clear and convincing standard). Compare Morales on behalf of Morales v. Bowen, 833 F.2d 481 (3d Cir. 1987) (applying a preponderance standard). Although there is deposition testimony that Hoffpauir recognized Alana as his daughter, scientific testing could corroborate this evidence. "The accuracy and infallibility of the DNA test are ... remarkable." Alexander v. Alexander, 42 Ohio Misc. 2d 30, 537 N.E.2d 1310, 1314 (1988).

In deposition, Dr. J. Craig Cohen, an expert in DNA testing, testified that it is possible to identify any relationship between Alana and Hoffpauir. See Thompson and Ford, DNA Typing: Acceptance and Weight of the New Genetic Identification Test, 75 Va. L. Rev. 45 (1989). DNA testing of Alana, the other children born to Alana's deceased mother and Rosemary would establish the probability of

relationship between Alana and Rosemary. Dr. Cohen can determine that they are probably related or probably not related. The probability index could be as low as one in five or as high as one in a hundred thousand. Each test requires a teaspoon of blood. According to Dr. Cohen, blood testing of necrotic tissue from Hoffpauir is not feasible. Compare In re Estate of Greenwood, 587 A.2d 749 (Pa. Super. 1991) (testing was possible because the coroner had blood and tissue samples from the decedent). It is alleged that Alana's known siblings do not object to being tested. See Aroonsakul v. Flanagan, 124 Ill. App. 3d 626, 464 N.E.2d 1091, 80 Ill. Dec. 108 (1984) (illustrating the probative value of sibling blood tests).

In People v. Lipscomb, 574, N.E.2d 1345 (Ill. App. 1991), complicated testing of blood and semen allowed an expert to

describe defendant's profile as one in seven billion. This DNA testing would not achieve that accuracy. However, Rosemary's testing would produce relevant evidence, which could be considered by the trier of fact with other evidence in evaluation Alana's claim. LSA-C.C.P. art. 1422 provides:

> "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action,..."

Rosemary Hoffpauir Schuh was not originally a party to this lawsuit, but she has been served with a rule to show cause why her blood should not be tested. She is a forced heir to her father's estate, which remains under administration, and she accepted her father's succession, unconditionally after this suit was filed. Compare William M. Superior Court (Dana F.), 225 Cal. App. 3d 447, 275 Cal. Rptr.

103 (1990) (no estate existed). The attorney for the estate has filed briefs on her behalf, stating that Rosemary strongly opposes a blood test. There is no allegation that Rosemary's representation by the estate's executors and attorney is inadequate. The requirements of notice and an opportunity to be heard have been met.

The state's interest in the orderly disposition of estates may bar assertion of paternity claims after distribution of an estate. Lalli v. Lalli, 439 U.S. 259, 99 S. Ct. 518, 58 L.Ed. 2d 503 (1978). However, Hoffpauir's estate is under administration and Alana's claim is timely. Reed v. Campbell, 476 U.S. 852, 106 S. Ct. 2234, 90 L.Ed 2d 858 (1986). The inheritance rights of legitimate and illegitimate children are entitled to equal protection of the law. Succession of Brown, 388 So. 2d 1151 (La. 1980). Alana

has a constitutional right to prove filiation to a deceased father. Trimble v. Gordon, 430 U.S. 762, 97 S. Ct. 1459, 52 L.Ed. 2d 31 (1977). That right must be weighed against the invasion of Rosemary's privacy presented by the compelled blood test. LSA-Const. art. I, §3. See Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943 (1987). To compel a blood test of Rosemary, Alana's interest in identifying her father must outweigh Rosemary's expectation of privacy.

Although she bears the Benoit name, Alana has never enjoyed a father/daughter relationship with Benoit. She has an overriding emotional and financial interest in knowing her father's identity. Rosemary has a financial interest in opposing Alana's claim but has asserted no physical or religious obstacles to a blood test. Schmerber v. California, 384 U.S. 757, 86

S. Ct. 1826, 16 L.Ed. 2d 908 (1966). The invasion of Rosemary's privacy is minimal. Breithaupt v. Abram, 352 U.S. 432, 77 S. Ct. 408, 1 L.Ed. 2d 448 (1957). Rosemary has the alternative of conceding a relationship to Alana. Under these circumstances, the trial court erred in denying Alana's motion to compel the DNA testing of Rosemary's blood.

For the foregoing reasons, the judgment of the trial court is reversed and the motion is granted. The matter is remanded for further proceedings.

REVERSED; MOTION GRANTED; REMANDED.

Filed: October 31, 1991

SUPREME COURT OF LOUISIANA

NO. 91-CC-0515

ALANA SUDWISHER

versus

ESTATE OF HOFFPAUIR, ET AL

LEMMON, Justice, Concurring

La. Rev. Stat. 9:396A, a special statute pertaining to determination of paternity, provides:

> "Notwithstanding any other provision of law to the contrary, in any civil action in which paternity is a relevant fact, or in an actin en desaveu, the court, upon its own initiative or upon request made by or on behalf of any person whose blood is involved, may or, or upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the

> mother, child, and alleged father to submit to the drawing of blood samples and shall direct that inherited characteristics in the samples, including but not limited to blood and tissue type, be determined by appropriate testing procedures. If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require."

This statute provides that in certain situations the trial judge "shall order the mother, child and alleged father to submit to the drawing of blood samples." The statute does not purport to prohibit the judge's ordering blood tests in other situations. Therefore, the statute is not controlling in this case, and the general rules of discovery must be applied.

La. Code Civ. Proc. art. 1422 permits

discovery regarding any non-privileged matter that is relevant to the subject matter of the pending action. The information sought is relevant to plaintiff's claim of filiation with the decedent. While the information, depending on the results, may not be admissible at trial, the present issue is discoverability and not admissibility.

Because the requested discovery involves an invasion of decedent's legitimate daughter's privacy, the mover should be required to make a prima facie showing of filiation in order to obtain the requested order.[1] Once the prima facie showing is made, this becomes a

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[1] Here, the mover arguably established that showing by deposition testimony that decedent had acknowledged her as his daughter. Even if this showing was insufficient, this court, after pronouncing the requirement of a showing by this decision, can remand for an evidentiary hearing on this requirement.

contest between competing claimants to the succession assets.[2] Unless the legitimate daughter has some compelling reason to resist the taking of a small sample of her blood (such as a physical infirmity), fundamental fairness prohibits her from keeping this possibly relevant evidence from the court which is to decide plaintiff's claim that has been supported by a prima facie showing of filiation.2 The state has a legitimate interest in insuring this fundamental fairness by ordering the relevant testing of either or both claimants.

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[2] While the succession and not the legitimate daughter is the technical party at this stage of the proceeding, there appears little doubt that the legitimate daughter is resisting plaintiff's claim to the succession assets (valued at $2,000,000) through the succession representative and that she has a substantial interest in defeating the claim.

SUPREME COURT OF LOUISIANA

No. 91-CC-0515

ALANA SUDWISCHER

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ESTATE OF PAUL HOFFPAUIR, ET AL

DENNIS, J., dissenting.

I respectfully dissent. The majority correctly recognizes that this case involved constitutional balancing, but does not focus on the constitutional rights genuinely at issue. The conflict set up by the majority opinion consists of Rosemary Hoffpauir Schuh's right not to have a blood test performed on her versus plaintiff Alana Benoit Sudwischer's right to prove her filiation to her deceased father. However, as will be shown below these are not the rights that are in conflict in this case.

The majority alleges that "Alana has

a constitutional right to prove filiation to a deceased father. Trimble v. Gordon, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977)." However, Trimble does not extend so broadly. The court in Trimble dealt with the issue of whether a state could, under the equal protection clause of the Fourteenth Amendment, discriminate against illegitimate children by denying them rights in their father's succession. The opinion does not recognize a constitutional right to inherit property or to filiate per se. The court merely provided that an illegitimate child should equally enjoy whatever rights a legitimate child may have in the succession of her father. Trimble had standing to assert these rights only because she was able to show affirmative state action which impermissably infringed upon her right to be treated equally under the law. See

also Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 156, 56 L.Ed.2d 185, 98 S.Ct. 1729 (1978).

On the other hand, as conceded by the majority, Schuh has constitutionally protected privacy and due process rights under both the federal and state constitutions which protect he from unreasonable invasions or intrusions of her body. See Cruzan v. Director, Missouri Dept. of Health, ____ U.S. ____, 110 S.Ct. 2841, 2856 (1990) (O'Connor, J., concurring) ("Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause"); see also Hondroulis v. Schuhmacher, 553 So.2d 398, 414-15 (La. 1989). This right of privacy has evolved

over several decades. The Supreme Court first recognized a right of privacy based on the United States Constitution in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). This right of privacy has been described as "the most comprehensive of rights and the right most valued by civilized man." Stanley v. Georgia, 394 U.S. 557, 564, 89 S.Ct. 1243, 1248, 22 L.Ed.2d 542 (1969) (citing Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572-73, 72 L.Ed.2d 944 (1929) (Brandeis, J., dissenting). In Whalen v. Roe, 429 U.S. 589, 599-600, 97 S.Ct. 869, 876-77, 51 L.Ed.2d 64 (1977), the Supreme Court specifically recognized that the right of privacy encompasses at least two different kinds of interests, "the individual interest in avoiding disclosure of personal matters, and . . . the interest

in independence in making certain kinds of important decisions." In recent cases, the court has discussed the privacy right as one of those fundamental rights that are "'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [they] were sacrificed.'" Bowers v. Hardwick, ___U.S. __, 106 S.Ct. 2841, 2844, 92 L.Ed.2d 140 (1986) (quoting Palko v. Connecticut, 302 U.S. 319, 325-26, 58 S.Ct. 149, (1937)). See Roe v. Wade, 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973).

Under the Supreme Court's opinion in Flagg Bros., Inc. v. Brooks, supra, in order to prove a violation of rights guaranteed under the Fourteenth Amendment, a party must show that the party depriving her of her right acted under color of the challenged statute, and that the

violator's actions are properly attributable to the state. Id., at 156. However, Sudwischer has failed to allege the existence of a statute which impermissably infringes on her right to pursue her claim of legitimacy. There has been no affirmative act on the part of the state to interfere with her right to equal protection of the law. Absent state action, then, Sudwischer has no constitutional right which can be raised in this matter to balance against the rights of Schuh. Schuh, however, can show state action. An affirmative order of a district court forcing her to submit to a blood test would meet even the most conservative notions of state action espoused by the U.S. Supreme Court in Flagg Bros.

Schuh's constitutional rights, however, are not automatically immune to

every state action in this area. In determining the propriety of state interference, the U.S. Supreme Court and this court have determined that where the right of personal privacy is involved, state interference may be justified only by compelling state interests, and must be narrowly drawn to express only those interests. Carey v. Population Services Intern., 431 U.S. 678, 685, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); Hondroulis v. Schuhmacher, supra, at 415.

Accordingly, the proper balance to strike is the state's interest in forcing Schuh to submit to a blood test versus Schuh's own privacy interest in not submitting to a blood test. See Cruzan, 110 S.Ct. at 2853; see also Breithaupt v. Abram, 352 U.S. 432, 439, 77 S.Ct. 408, 1 L.Ed.2d 448 (1957) ("As against the right of an individual that his person be held

inviolable . . . must be set the interests of society"). The state's interest here can be characterized as limited and even minimal. As noted by the majority, the purpose of the statute was originally for the purpose of establishing filiation for child support purposes. Because the support obligation is owed only by a parent, it would be stretching the imagination to assert that the state would intend that siblings and other collaterals would be subjected to court-imposed blood tests. If the statute can be used to support claims of filiation for establishment of rights to a succession, Sudwischer must still explain why the Legislature has declined to give expansive remedies to the illegitimate child by providing explicitly in the act that only "the mother, child, and alleged father [are required] to submit to the drawing of blood

samples." La. R.S. 9:396 is based on the Uniform Act on Blood Tests to Determine Paternity. Schuh does not fall within the purview of the statute by its express terms, nor is she a party to the filiation action. Sudwischer has not offered anything to indicate that the legislature intended the act to extend to other relatives not enumerated in the act. Furthermore, other states interpreting the uniform act have likewise refused to extend the act to persons other than the alleged father, mother, and child, see e.g., Manuel v. Spector, 712 S.W.2d 219 (Tex. App. San. Ant. 1986); In re Mengel, 429 A.2d 1162 (Pa. Super. 1981), or other non-parties, see Voss v. Duerscherl, 425 N.W.2d 828 (Minn. 1988); Hibbs v. Chandler, 684 S.W.2d 310 (Ky.App. 1985).

In fact, the state interest is discouraging multiple paternity actions is

well established in our law. See La. C.C. arts. 184-209. While this court has recognized the illegitimate's ability to filiate with more than one father, Griffin v. Succession of Branch, 479 So.2d 324 (La. 1985), the right to filiate for succession rights alone has never been recognized by this court, or any other court, as rising to the status of a constitutional right. In fact, the ability to filiate with multiple fathers has been criticized by other courts, see e.g., Matter of Estate of Schneider, 441 N.W. 2d 335, 337 (Wisc. App. 1989), and to claim that the state has an interest in allowing multiple filiation is a policy not only disavowed by our civil code but is in direct conflict with the policies of every other state of the union.

Considering the limited scope of the act and the fact that Schuh is not a party

to the filiation proceeding, any state interest in insuring that Sudwischer can prove her filiation to the deceased is minimal at best. Accordingly, in balancing this reduced state interest reflected in the narrowly tailored act against Schuh's constitutionally protected privacy rights, the latter must necessarily prevail.

For these reasons, I respectfully dissent.

SUPREME COURT OF LOUISIANA

No. 91-CC-0515

ALANA SUDWISCHER

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ON REHEARING

COLE, J., DISSENTING

I previously dissented from the order of this court requiring Rosemary Hoffpauir Schuh to submit to a blood test. The majority, on rehearing, again reverses the trial court and grants the motion to compel submission to the test, thus affirming our prior order. Again, I dissent.

As already stated, the majority's action equates to judicial legislation, ignoring the admonition of Article 1 of our Civil Code. "The sources of law are

legislation [1] and custom."

La.R.S. 9:396 is explicit and controls. It authorizes court-ordered blood testing of "the mother, child, and alleged father" in cases in which paternity is relevant. It does not authorize the blood testing of an alleged sibling to prove filiation. For these reasons, and for the additional reasons assigned by Justice Dennis in his dissent, I respectfully dissent.

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[1] Legislation is a solemn expression of legislative will. La. C.C. art.2.